

89-1333

NO.

Supreme Court, U.S.

FILED

FEB 17 1990

JOSEPH F. SPANIOLO,
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1989

CLEMMIE SANDERS,
Petitioner,

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOEL W. HOWELL, III
5446 Executive Place
P. O. Box 16772
Jackson, Mississippi 39236-6772
Telephone: (601) 362-8129

Counsel for Petitioner

17 PB

QUESTION PRESENTED FOR REVIEW

Whether the opinion of the Fifth Circuit upholding the District Court's finding of no racial discrimination and pretextual discharge can be upheld on a record which can only leave "...the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Company, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed.2d 746, 766 (1948).

TABLE OF CONTENTS

Question Presented for Review	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	iv
Jurisdiction of the Court	iv-v
Statutes Involved	v-vi
Statement of the Case	1
Reasons for Granting the Writ	5
Conclusion	8
Certificate of Service	10

Appendix

Decision of the United States
District Court for the Southern
District of Mississippi, Jackson
Division, January 27, 1987 A-1

Decision of the United States
Court of Appeals for the Fifth
Circuit, October 18, 1989 A-72

Decision of the United States
Court of Appeals for the Fifth
Circuit denying rehearing,
November 17, 1989 A-104

TABLE OF AUTHORITIES

	PAGE
<u>United States v. United States Gypsum Company</u> , 333 U.S. 364, 395, 68 S.Ct. 525, 542, 32 L.Ed.2d 746, 766 (1948)	i, 6
<u>Sylvester v. Callon Energy Services, Inc.</u> , 781 F.2d 520 (5th Cir. 1986)	8-9

RULES AND STATUTES

Federal Rule of Civil Procedure 52 (a)	6
42 U.S.C. §2000e	v
42 U.S.C. §2000e-3(a)	v-vi
42 U.S.C. §1981	vi

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Mississippi, Jackson Division, rendered on January 27, 1987, was not reported and is set forth in the appendix at A-1.

The opinion of the United States Court of Appeals for the Fifth Circuit, rendered October 18, 1989, was not reported and is set forth in the appendix at A-72.

The opinion of the United States Court of Appeals for the Fifth Circuit denying rehearing, rendered November 17, 1989, was not reported and is set forth in the appendix at A-104.

JURISDICTION OF THE COURT

The judgment of the United States

Court of Appeals for the Fifth Circuit was entered on October 18, 1989. (A-72) The order denying a petition for rehearing was entered on November 17, 1989. (A-104)

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Fifth Circuit under 28 U.S.C. §1254(1).

STATUTES INVOLVED

§703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1) provides, in pertinent part:

It shall be an unlawful employment practice for an employer...to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

§704(a) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a) provides, in

pertinent part:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, because he has opposed any practice made an unlawful employment practice by this subchapter....

42 U.S.C. §1981 provides, in pertinent part:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Petitioner Clemmie Sanders was hired by South Central Bell in a craft position as a frame attendant on August 20, 1970. In 1971, he unsuccessfully sought a craft promotion, after which he filed a charge of discrimination with the Equal Employment Opportunity Commission. The EEOC ultimately issued a right to sue letter on this charge on December 20, 1986, but on December 1, 1974, Mr. Sanders had been promoted to switchman, mooting the issue.

From 1977 until his termination in 1983, Mr. Sanders was employed in a management position. All such employees' performance was evaluated by criteria delineated in the publication Performance and Potential Evaluation Procedure,

under which an "outstanding" performance was rated numerically from 100 to 110, a "good" performance rating was defined as one from 91 to 100, a "satisfactory" performance was from 81 to 90, and 80 and below was considered "unsatisfactory." Under this system, Mr. Sanders never received an unsatisfactory rating until September of 1983, at the time of his discharge, which his evaluations corroborate:

1977,	G-93
1978-79,	S-90 (changed from G-93)
1980-81,	S-90
1981,	S-90 (changed from G-96)
1981-82,	G-93
1983,	U-80

Mr. Sanders was initially assigned to Dispatch and Administration, then was transferred in June of 1980 to the Switching Control Center. That fall, he was assigned to work the midnight to

eight shift, and he began receiving threatening notes with racial overtones. After numerous requests for transfer, he was loaned to the Network Service Center in 1981, where he worked until he returned to the Switching Control Center some nine months later.

Mr. Sanders' personnel file was handled unusually. For example, in February of 1982, a conversion was discussed with him, and he was relieved of that assignment. However, this was not recorded in his personnel file until February of 1983, an unusual delay.

Also of importance is that a number of South Central Bell's records were not produced until trial. Among these were private files kept by one of his supervisors in his desk.

In the summer of 1983, Mr. Sanders was made a building manager, and, after a strike that fall, he was terminated. The evaluation under which he was terminated, an 80 for July 31, 1982-June 30, 1983 was completed by one of his supervisors, Ross Taylor on July 12, 1983 and signed by another supervisor, Hal Moss the same day, but it was not reviewed with Mr. Sanders until September 26, 1983. It appears more than coincidence that the evaluation was not made known to Mr. Sanders until after the strike, so that South Central Bell received the benefit of his technical expertise during the strike, and then fired him immediately after it was resolved.

The reason assigned by Ross Taylor

for discharging Mr. Sanders was falsification of personnel records and poor performance. Though Mr. Taylor also said that petitioner could be discharged for lack of technical competence, he never told Mr. Sanders that he was technically incompetent. Moreover, petitioner was not terminated until Mr. Taylor had requested and received the transfer of another black employee into his group. Prior to that event, Mr. Sanders was the only black employee in the group.

ARGUMENT

Petitioner accepts the burden of showing that the ultimate issue presented is whether or not there was intentional discrimination under Title VII, and that the trial court's factual find-

ings must be accepted, unless, under Rule 52(a) of the Federal Rules of Civil Procedure, they are are "clearly erroneous." Such a fact finding is clearly erroneous "...when although there is evidence to support it, a reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Company, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed.2d 746, 766 (1948).

Despite this burden, petitioner submits that this is such a case. While the trial court found that petitioner could not master his job, lack of technical expertise was not given as a ground of discharge, and Mr. Sanders' expertise was utilized extensively in

the strike immediately preceding his dismissal. Moreover, South Central Bell's evaluation system, while complex, was inconsistently applied to Mr. Sanders and was merely a pretextual excuse for his discharge, as shown by changes in the ratings assigned by his immediate superiors and the maintenance of private files outside the course of normal company records.

In his finding that petitioner was not discriminated against in his discharge, the trial judge found that Mr. Sanders simply could not master the complex technological changes constantly occurring in his work. However, lack of technical confidence was not assigned by South Central Bell as a ground of discharge. In fact, Mr. Taylor testified

that he never told Mr. Sanders that he was not technically competent.

This is compounded by South Central Bell's utilizing petitioner's technical expertise during the strike immediately prior to his discharge. Finally, lack of technical competence can scarcely be at issue since, immediately after Mr. Sander's discharge, he was replaced by two white female frame attendant supervisors.

CONCLUSION

Petitioner submits that this record makes for a case that should be decided in a vein similar to Sylvester v. Callon Energy Services, Inc., 781 F.2d 520 (5th Cir. 1986), where the Court applied the clearly erroneous standard and found that reversal of a bench trial ruling

for the employer could not stand because "...the entire record does not support two permissible views of the evidence and...a mistake has been committed in this case." (781 F.2d at 524)

The Sylvester court examined the trial court's conclusion and found that appellant there clearly showed that he was a victim of racial discrimination. (781 F.2d at 525-526) Here, South Central Bell's explanations are not borne out by the record, so that this Court must find that the trial court's findings regarding the liability issues were clearly erroneous, as was the Fifth Circuit's decision to affirm those findings.

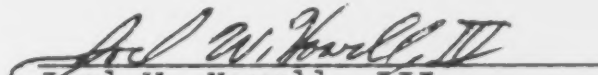
Respectfully submitted,

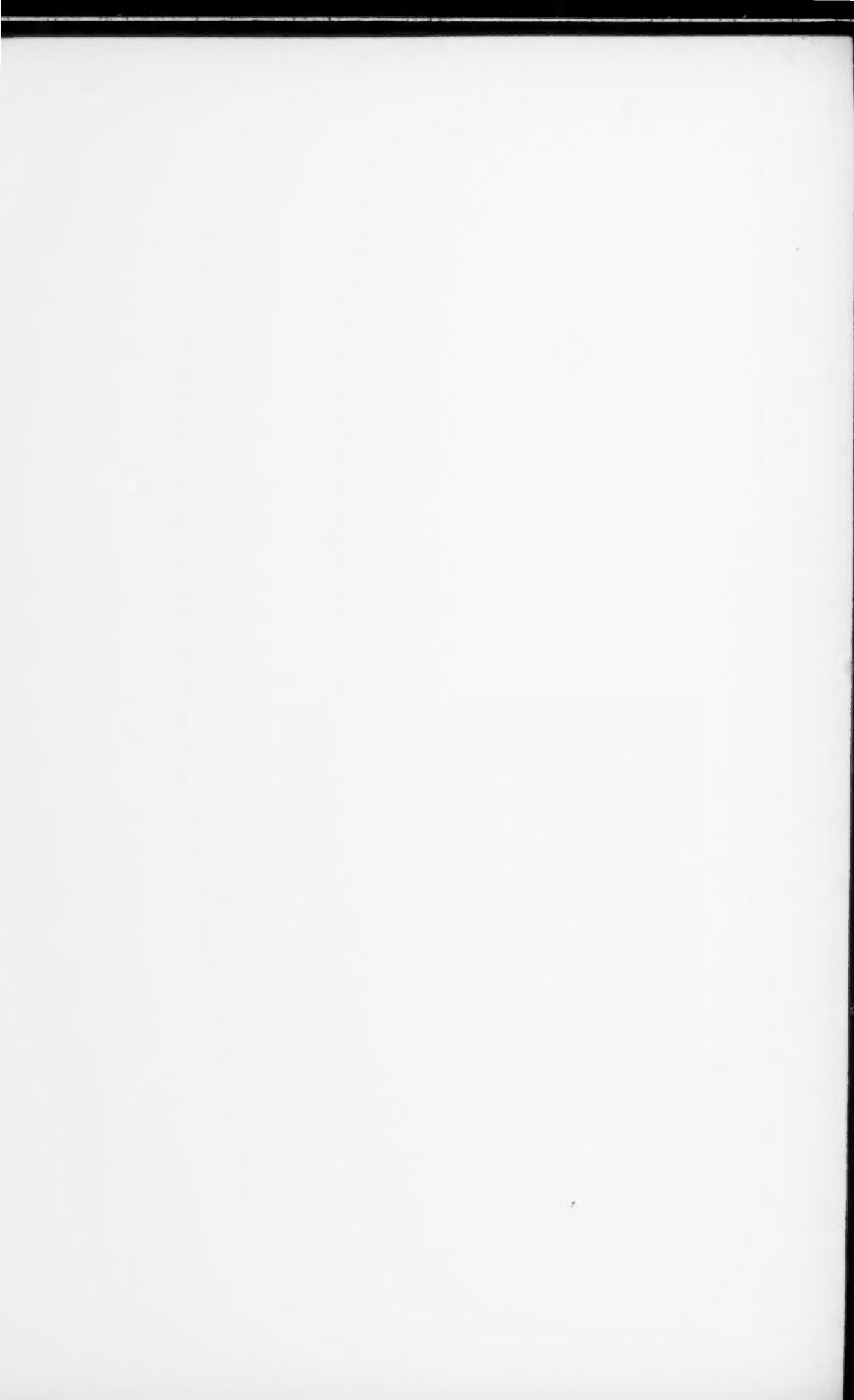


Joel W. Howell, III,
Counsel for Petitioner
5446 Executive Place
P.O. Box 16772
Jackson, Mississippi
39236-0772
601/362-8129

CERTIFICATE OF SERVICE

I, Joel W. Howell, III, of counsel,
do hereby certify that I have caused to
be delivered three (3) copies of the
foregoing Brief of Petitioner to Paul O.
Miller, III, Esq., P.O. Box 55507,
Jackson, MS 39296-5507, this the __th
day of February, 1990.


Joel W. Howell, III



89-1333 (2)

NO.

FILED

FEB 12 1990

JOSEPH F. SPANIOLO, JR.
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1989

CLEMMIE SANDERS,
Petitioner,

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX

JOEL W. HOWELL, III
5446 Executive Place
P. O. Box 16772
Jackson, Mississippi 39236-6772
Telephone: (601) 362-8129

Counsel for Petitioner



APPENDIX TABLE OF CONTENTS

Memorandum Opinion of the District Court, January 23, 1987	A-1
Decision of the United States Court of Appeals for the Fifth Circuit, October 18, 1989	A-72
Decision on Petition for Rehearing, November 17, 1989	A-104



IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CLEMMIE SANDERS,
Plaintiff

v. CIVIL ACTION NO. J83-0829(B)

SOUTH CENTRAL BELL
TELEPHONE COMPANY,
Defendant.

MEMORANDUM OPINION

This is a civil rights action brought by the plaintiff pursuant to Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e et seq.) and the Civil Rights Act of 1866 (42 U.S.C. §1981). Plaintiff Clemmie Sanders, a black male, contends he was discharged because of his race and in retaliation for filing previous charges of discrimination with the Equal Employment Opportunity Commission. Plaintiff also contends he was discriminated

against as the result of defendant's failure to transfer him and by discriminatorily paying him a salary less than similarly situated white employees.

Defendant South Central Bell Telephone Company is a wholly owned subsidiary of Bell South Corporation and is engaged in the telephone industry with operations in Mississippi and, insofar as plaintiff's employment, in Jackson, Mississippi. Defendant is an employer as defined in 42 U.S.C. §2000(e)(b).

Plaintiff was initially hired by defendant as a frameman on August 24, 1970, and was promoted to switchman on December 1, 1974. Subsequently, plaintiff attended the defendant's Assessment Center, which was set up to

identify employees for promotion to supervisory ranks. Following plaintiff's attendance at the Assessment Center, it was determined he was not promotable and, in accordance with defendant's Equal Employment Opportunity policy, plaintiff and other minority employees were sent to a local college to prepare them for promotion. Plaintiff was then promoted to a first level supervisor position on August 1, 1977.

During plaintiff's tenure of employment with defendant, he filed two charges of discrimination with the Equal Employment Opportunity Commission ("EEOC"). His first charge was filed in 1973 alleging that he had not been promoted because of his race. The EEOC issued a determination that there was

cause to believe plaintiff's allegations were true. The EEOC's conciliation attempts failed, however, and plaintiff was issued a right-to-sue letter regarding this charge on December 20, 1976. The EEOC took no further action on his charge. At the time he filed this charge, plaintiff was employed as a frameman, but by the time the EEOC right-to-sue letter was issued he had been promoted to the job of switchman. Plaintiff filed a second charge with the EEOC in 1980 during the period he was a first level supervisor alleging that he was receiving lower pay than similarly situated white supervisors. On March 12, 1981, the EEOC issued its determination finding no reasonable cause to believe plaintiff's allegations were true

and, accordingly, issued plaintiff a right-to-sue letter. Plaintiff did not pursue this matter further.

As a first level supervisor, plaintiff was assigned to the Jackson and Meridian District Stored Program Switching Control Center ("SP/SCC"). The SP/SCC is part of defendant's Switched Services Group. The SP/SCC is the electronic switching control center for defendant's Jackson and Meridian District offices. The evidence established that defendant utilizes two types of telephone switching equipment. The older switching equipment, called electromechanical switching machines, is being phased out of defendant's operations. The new equipment replacing the electromechanical switching machines is

called electronic or stored program switching machines. The process of replacing the electromechanical switching machines with the new stored program machines is called a "conversion" in the telephone industry. Plaintiff testified that he was trained on the electronic or stored program switching machines.

Defendant's SP/SCC for the Jackson and Meridian districts is supervised by a second level supervisor who in turn supervises several first level supervisors, some of whom have supervisory responsibilities inside the SP/SCC and some of who have supervisory responsibilities for outside switching offices within the Jackson and Meridian districts. First level supervisors in turn, depending on their functional re-

sponsibility over craft employees in a bargaining unit represented by the Communication Workers of America ("CWA").

When plaintiff was promoted to first level supervisor on August 1, 1977, his immediate superior (second level supervisor) was W. P. Cessna who remained his supervisor until January, 1978. D. A. Walters then became plaintiff's supervisor and remained so until May 31, 1980. During the time period when Cessna and Walters supervised the plaintiff, it was the defendant's policy to conduct a formal performance evaluation on each first level supervisor on an annual basis each July. The time period later changed to January evaluations and then June evaluations. S. R. Taylor succeeded D. A. Walters and be-

came plaintiff's supervisor in 1980. All of plaintiff's Second Level Supervisors were white.

Defendant's evaluation and salary administration system is, to say the least, complex. To complicate matters further, defendant's policies are frequently revised by its head office in Birmingham, Alabama. The evidence shows that from at least 1977, when plaintiff first became a supervisor, until 1981, employees were evaluated utilizing a system of alphabetic and numeric codes. An employee could be rated U (unsatisfactory), S (satisfactory), G (good) or O (outstanding). Within each alphabetical classification was a numerical rating. An employee could be rated from U-71 to U-80, S-81 to S-90, G-91 to

G-100 or O-100 to O-110. According to Charles Foster, defendant's Personnel Supervisor and EEO Officer, defendant's personnel department made the decision that the ranges within each alphabetical code were too broad and difficult to accurately apply, so each range actually contained only three numerical ratings that could be applied to employees. For example, U-73, U-76, U-80, S-83, S-86, S-90, etc. In 1981, the evaluation system changed to a completely numerical system, utilizing the same numerical ranges but deleting the alphabetical prefix.

Defendant's salary administration system evolved around its evaluation system. When an employee initially assumed a supervisory position from a

craft or bargaining unit position, as did plaintiff, he customarily assumed a G-96 rating, which he retained until such time as his performance would indicate that a different rating was appropriate. A beginning supervisor's initial wage rate was customarily 7.5 percent to 10 percent above their non-management wage rate, depending on such factors as whether the promotion involved relocation. If this increase was insufficient to bring the beginning supervisor up to the minimum entrance wage rates for supervisors, the beginning supervisor would receive an additional increase to bring him in line with that rate.

Wage increases for first level supervisors come about in one of two ways.

Defendant occasionally grants across-the-board living adjustments to all employees based on a percentage of their wage rate at the time of their increase. Most wage increases occur, however, based on an employee's annual evaluation rating. According to the trial testimony, each management level position is assigned a salary range. An employee with a rating of G-96, or later 96, should theoretically make 96 percent of the salary range's top level for his position, except to the extent seniority is a factor. Defendant generally considers that it takes a management level employee six (6) years to reach peak efficiency in a position. As a result, an employee with one (1) year's experience who is rated a G-96 does not re-

ceive the same salary as a similarly rated employee with six (6) year's experience. Defendant's salary administration system is, therefore, one that is a function of percentages of the salary range for each position, an employee's wage rate, an employee's seniority and the employee's annual salary rating.

Plaintiff's evaluations for the years he was a first level supervisor were:

1877-78 - G-93
1978-79 - S-90
1980-81 - S-90
1/1981 - 6/1981 - S-90
7/1981 - 1982 - 93
1982/1983 - 80

At trial, it was apparent there exists some confusion among defendant's second level supervisors over its evaluation system and the meaning of certain

ratings. S. R. Taylor testified it was his understanding that an S-90 was the lowest evaluation rating he could assign a first level supervisor. Taylor's supervisor, Hal Moss, and Charles Foster testified, however, that first level supervisors could be rated lower than an S-90. Nevertheless, there is no dispute that plaintiff's evaluation ratings decreased with each evaluation until he reached an S-90 and then leveled at that point until his June 1982 evaluation on which he received a 93. There is also no dispute that Taylor and Moss understood they were rating plaintiff's performance as marginal or unsatisfactory during this time period. In 1983, his evaluation rating again fell, this time to 80.

The undisputed evidence established that Taylor never gave any first level supervisor other than plaintiff less than a G-96 evaluation rating. Furthermore, both Moss and Taylor testified they expected the first level supervisors under their supervision to perform at least in the "G", or 93 and above, range on their evaluations. The evidence also establishes that a white second level supervisor, D. A. Walters, was removed from his position, and demoted to a staff position where he did not supervise other employees, after he received a single evaluation rating of S-90 from Moss in 1980.

The criteria upon which plaintiff was evaluated, while perhaps logical to those in the field, defies simple expla-

nation. According to the testimony at trial, the defendant's policy is to bring its SCC departments into compliance with the Bell System Practice Manual. Once this is accomplished, the SCC is said to be "certified" by defendant in 1981. Prior to certification, first level supervisors were evaluated in part on their performance on a variety of indices. The indices on which they were evaluated, in at least some cases, changed after the SP/SCC was "certified" in 1981. Although evaluations were based in part on objective criteria, they were also, to some degree, subjective.

Perhaps the most important indices with regard to the Jackson SP/SCC as a whole was the Network Switching Perform-

ance Measurement Plan ("NSPMP"). The NSPMP measures the performance of the various technological aspects of the SP/SCC and provides an objective reading on how the overall switching operation performed. Both Moss and Taylor were held accountable for the NSPMP. Moss and Taylor both testified, however, that, while the entire NSPMP was important, the various individual indices making up the NSPMP were more appropriate for measuring the individual responsibilities of first level supervisors. In other words, while Moss and Taylor were responsible for the total SP/SCC in Jackson, the first level supervisors were directly responsible for individual aspects of the Jackson SP/SCC. Accordingly, the functional area of su-

pervisory responsibility dictated the index or indices which best reflected a first level supervisor's job performance.

The testimony at trial established that some time after "certification" in 1981, a specific index for measuring a field maintenance supervisor's performance was developed. Plaintiff was a field maintenance supervisor at the time of his termination. This index was known as the "SCC Effectiveness" index. The "SCC Effectiveness" index measured a number of factors that defendant's managerial staff felt more accurately reflected a field maintenance supervisor's job responsibilities. The record further establishes that the first evaluation measurement was the June, 1983

evaluation.

Taylor became plaintiff's supervisor on June 1, 1980. Since defendant changed its time frame for conducting annual performance appraisals from a July to July time frame to a January to January time frame, neither Taylor nor his predecessor, D. A. Walters, evaluated plaintiff's performance in June of 1980. Plaintiff's first formal performance evaluation under Taylor was for the time frame of January 1980 to January 1981.

Plaintiff, during the period when Cessna and Walters were his supervisors, supervised the functional areas of Dispatch Administration and Trunk Maintenance. When Taylor became his supervisor, plaintiff was supervising

the functional area of Trunk Maintenance. After Taylor became the SP/SCC's second level supervisor for the Jackson district, he testified he experienced problems with plaintiff's performance in the area of Trunk Maintenance.

In October of 1980, Taylor decided that he needed supervisors supervising the craft employees who were working outside the 8:00 a.m. to 5:00 p.m. regular schedule of his first level supervisors. Taylor assigned Don Frazier, a white male, and plaintiff as the 4:00 p.m. to midnight and midnight to 8:00 a.m. shifts respectively. He stated he picked Frazier and plaintiff because they needed experience working trouble in the field. The court finds that Taylor assigned plaintiff to the mid-

night to 8:00 a.m. shift due to problems plaintiff was experiencing with supervising craft employees. The court credits Taylor's testimony that he assigned plaintiff to that particular shift because there were fewer employees to supervise and plaintiff would have a better opportunity to gain experience in the technical aspects of his job.

In late 1980 or early 1981, plaintiff was temporarily transferred to defendant's Network Service Center. This was an attempt by Taylor and Moss to assist plaintiff by placing him in a different area under a different supervisor without subordinates reporting to him so that his performance could improve. Plaintiff had requested several times to be transferred to another area.

The evidence introduced at trial indicated, and this court finds, that if plaintiff's temporary assignment proved satisfactory, that he would have received a permanent assignment to that area.

In June of 1981, plaintiff's supervisor in the Network Service Center, H. L. Biggs, rated him as S-90 on his annual evaluation. Plaintiff's evaluation form for June of 1981 states: "[Plaintiff] has little knowledge of the various switching systems, including ESS; he has little knowledge of toll carrier systems, or operation of the network." Subsequently, Biggs requested that plaintiff be returned to the SP/SCC so that a more suitable replacement could be found.

Plaintiff returned to Taylor's supervision in September of 1981. Taylor determined, based on plaintiff's performance at the Network Service center, that plaintiff did not understand how the network operated. In an effort to help plaintiff acquire a better understanding of the network, Taylor assigned plaintiff as a Field Maintenance Supervisor over several small ESS offices and also a small conversion. Such an assignment gave plaintiff less overall responsibility and allowed him the time to learn more about the network. Plaintiff was assigned the North Rankin, Brandon and Madison ESS offices and the Flora conversion. In connection with his responsibilities with the Flora conversion, plaintiff was appointed chair-

person of the conversion's ESS (Trunks and Special Services) Committee. The court finds that the overwhelming evidence, including the testimony of plaintiff's fellow first level supervisor who worked with him on the Flora conversion, Al McSweyn, establishes that plaintiff did not perform satisfactorily with regard to his responsibilities over the Flora conversion and that he was relieved of those responsibilities by Taylor for that reason. Taylor also relieved plaintiff of his supervisory responsibilities over the frame duties in the offices under plaintiff's responsibility due to unsatisfactory performance in that area of his job. This left plaintiff with responsibility for two (2) switching equipment technicians

and three switching offices plus the Flora office and other small offices for which plaintiff became responsible as they were converted.

A Field Maintenance Supervisor's primary function is to make sure the craft employees assigned to him efficiently perform the work assigned, or in defendant's terminology "loaded", to them by the SP/SCC's Dispatch and Administration Division. The evidence indicates that work in the SP/SCC network is assigned by a sophisticated process resulting in the "loading" of work according to a pre-determined priority schedule. A Field Maintenance Supervisor does not normally have the authority to "load" the work of his subordinates. When a Field Maintenance

Supervisor does not normally have the authority to "load" the work of his subordinates. When a Field Maintenance Supervisor determines that certain work needs to be performed in one of his offices, he prepares a work request form and submits it to Dispatch and Administration to be "loaded" according to the priority schedule. Two types of work in the SP/SCC take priority over all others: (1) trouble reports, and (2) conversions.

Craft employees are commonly transferred among switching offices depending on the priority of the work needed to be performed and the availability of the craft people to perform the work. If a Field Maintenance Supervisor's employees are temporarily "loaned" from his offic-

es until his employees return or work for his offices reach a priority level requiring that employees be temporarily "loaned" to his offices. Defendant's system of "loading" work is done by reference to a series of charts that utilize historical data for the "loading" process. As a result, the Dispatch and Administration personnel know how long it should take an employee to complete a particular job assignment. When work takes longer than historically necessary or an emergency causes an employee to perform work differently than that "loaded" to him it is called a "load break".

Taylor closely supervised plaintiff throughout the first half of 1982. On plaintiff's June 1982 evaluation, he

showed improvement and was rated 93 by Taylor. Following the June 1982 evaluation, Taylor discontinued his close supervision of plaintiff and Taylor testified the result was that plaintiff's performance immediately deteriorated. Plaintiff admitted that he and Taylor had several discussions concerning his performance, which culminated in a discussion with plaintiff and a formal entry to his personnel file (a "Current Entry") on February 1, 1983. At that time, Taylor informed plaintiff that he had sixty days to improve his performance or further disciplinary action would be forthcoming. At trial, plaintiff denied that he was placed on probation at that time. However, plaintiff admitted reading the Current Entry sheet

on which the probation was clearly written. On April 22, 1983, Taylor reviewed plaintiff's performance with him and noted that while plaintiff had improved in some areas he had deteriorated in others. Taylor informed plaintiff that he was not performing satisfactorily and advised plaintiff that he would help him find another job.

On April 27, 1983, plaintiff completed a Record of Quality Inspections on one of his employees. John Woodall, a switching control technician. On this report plaintiff noted "Trunk Testing Flora - GNWD - Trunk Tested OK - 4/27/83." Taylor later reviewed this document but learned from the Trunk Committee that the Flora to Greenwood trunks were not operational because the

wiring was incomplete. As a result, Taylor conducted an investigation into the matter to determine what had actually transpired. On May 20, 1983, Taylor met with plaintiff and they discussed whether the report was falsified. Plaintiff, as he did at trial, denied that he falsified the document contending that actually Woodall only utilized proper testing procedures in testing the trunks but did not actually test the trunks. In his deposition, plaintiff testified that Woodall tested the trunks from Flora to Capital-Pearl SCC office. At trial, and after listening to the testimony of Woodall, however, plaintiff testified that the trunks were tested from Flora to the Meadowbrook ESS office.

At trial, there was a great deal of testimony about whether the trunks could be tested at all when they were not wired on both ends and not operational. The court credits the testimony of Bill Brunner, one of defendant's craft employees, who was formerly supervised by plaintiff and who had personally worked on the Flora to Greenwood trunks. Mr. Brunner testified that trunks were not tangible pieces of equipment but merely a function of a computer's or stored program's "memory". Until the "memory" is required to designate certain carrier channels a "trunk", there was no "trunk" to test. Thus, unless the "trunk" was completely wired and the computer or stored program had designated certain carriers as the Flora to

Greenwood trunks, there was nothing that could be tested. Furthermore, the overwhelming evidence at trial by everyone who testified except the plaintiff (including Moss, Taylor, Walters, Al McSweyn (first level supervisor), S. K. Lott (first level supervisor_ and Brunner), was that the document entry in question meant that the trunks were tested and were operational. There is no dispute whatsoever regarding the fact that the trunks were not operational at the time plaintiff stated that Woodall tested them. As a result, the court finds that plaintiff made a major mistake in his job function as a supervisor regarding the records on John Woodall and the Flora to Greenwood trunks. This is further evidence of inefficiency and

lack of attention to his job. The Court does not believe he intentionally falsified these records.

Following this event, Taylor and Moss met with Charles Foster, to discuss plaintiff's situation. Mr. Foster, whose testimony this court credits, testified that it was his duty to review personnel decisions regarding minority employees to insure the correct decision was being made and to make sure no discrimination was involved. Taylor and Moss informed Foster they wanted to relieve plaintiff of his supervisory duties and offer him a craft position. After reviewing plaintiff's personnel file and discussing the possible falsification issue with Taylor and Moss, Foster concurred in their deci-

sion. Taylor and Moss, however, told Foster they wanted to wait until plaintiff's evaluation before informing plaintiff of the decision. However, Taylor immediately relieved Sanders of his supervisory duties over the switching equipment technicians and assigned him the building manager function of the Field Supervisor's job not only for the four offices assigned to him but also most of the other offices in the Jackson district, which consisted of 17 or 18 buildings.

On September 26, 1983, plaintiff's performance evaluation was reviewed with him and he was advised that he could either accept a demotion back to a craft position or be terminated. The following day, plaintiff informed the

company that he preferred termination. The delay between the evaluation date and the termination date was in part the result of the normal time it took Taylor's supervisor to review the evaluations of the first level supervisors and in part the result of an intervening strike by defendant's craft employees, which caused plaintiff and other management employees to perform craft job duties. While the delay benefited the company, it was not discriminatory.

Plaintiff impresses the court as an intelligent and capable employee who was simply promoted beyond his abilities. This phenomenon is not unique to this plaintiff or this defendant. It does, unfortunately, occur from time to time and this Court is of the opinion

that is the case here. The SP/SCC is a very critical area of defendant's company. It is a highly technical area at the very heart of the company's operational core and its management employees are very demanding of their subordinates. All SP/SCC is constantly undergoing complex technological changes. The court is of the opinion that plaintiff simply could not master the complex technological changes constantly occurring in the SP/SCC.

Since the trial of this matter was a "full proof" trial, the Court finds it is unnecessary to recite the familiar burden of proof analysis of McDonnell Corporation v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248

(1981). The ultimate factual inquiry following a "full proof" trial is whether the defendant intentionally discriminated against the plaintiff. See United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983). Plaintiff's allegations of discriminatory treatment are also brought pursuant to Section 1981 (42 U.S.C. § 1981). The elements of proof under both Section 1981 and Title VII, however, are identical when these sections are used as a parallel basis for relief. See Jackson v. City of Killen, 654 F.2d 1181 (5th Cir. 1981); Whiting v. Jackson State University, 616 F.2d 116 (5th Cir. 1980).

With respect to plaintiff's discharge claim, the evidence in the in-

stant case establishes that the plaintiff was unable to satisfactorily perform his job as a first level supervisor in spite of the efforts of his supervisors to assist him. The court finds that plaintiff was fully apprised of his performance deficiencies and given adequate opportunity to improve his performance. Every supervisor plaintiff worked under as a managerial employee testified at the trial. With the exception of Mr. Cessna, plaintiff's first supervisor as a managerial employee, every supervisor testified that plaintiff's performance was less than satisfactory, each citing his inability to supervise craft employees and his lack of knowledge of the ESS network. Cessna testified that while he did not super-

vise plaintiff long enough to form any conclusions about his ability as a supervisor, that plaintiff was a slow learner.

Mr. Brunner, a switching equipment technician who worked under plaintiff's supervision, also testified that plaintiff was a poor supervisor who did not adequately communicate with or discipline subordinates. The court finds that these witnesses sincerely held these beliefs and that they were not based on plaintiff's black race. See Clark v. Huntsville City Board of Education, 717 F.2d 525, 528 (11th Cir. 1983); Chescheir v. Liberty Mutual Insurance Company, 713 F.2d 1142, 1148 (11th Cir. 1983); Moore v. Sears, Roebuck & company, 683 F.2d 1321, 1323 n.4

(11th Cir. 1982); Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1256 (5th Cir. 1977).

Plaintiff attempted to refute, explain and deny all of defendant's reasons for terminating his employment and offered evidence attempting to show defendant's practices were discriminatory. Plaintiff's rebuttal efforts can be variously categorized as follows: (1) unfair treatment, (2) unfair performance evaluations, (3) that similarly situated employees were treated differently, (4) defendant's actions at and immediately after his discharge, and (5) defendant's discriminatory practices. These efforts to establish pretext are discussed below:

Plaintiff's unfair treatment evi-

dence consisted of the following: (1) that his employees were often "loaned" to other supervisors, (2) that he did not have enough employees to perform the work in his offices, (3) that Current Entries were made in his personnel file as much as a year after an event occurred, (4) that Taylor made plaintiff and another black employee wipe down equipment during a strike, (5) that Hal Moss would not talk with him after Taylor terminated him, and (6) that he was not assigned to conversion work.

The credible evidence at trial overwhelmingly established that employees were commonly "loaned" to other supervisors depending on the priority of the work and the number of employees available to perform the work. Further-

more, plaintiff had responsibilities for the smaller offices in the Jackson district, so it is only logical that the bigger offices would be in need of extra employees more often than the smaller offices. Plaintiff's testimony that he did not have enough employees to perform the necessary work in his offices was not a problem that reflected upon his performance. If plaintiff's employees were not available to him, less work was scheduled in his offices. Furthermore, the index entitled "% Load Adherence" attached to plaintiff's last performance evaluation shows that plaintiff met his objectives every month in that category indicating that "load breaks" did not adversely affect his performance. In other words, the work assigned to em-

ployees in plaintiff's offices did not take longer than the time normally scheduled for the work. Thus the work assigned to plaintiff's offices did not require more employees than those "loaned" to do the work.

Nor does plaintiff's complaint about the Current Entries in his personnel file indicate racial bias. The undisputed evidence at trial indicated that Taylor, as did other second level supervisors, utilized the Current Entry process as a last resort to communicate the seriousness of an employee's performance or disciplinary problems to him. Furthermore, Mr. Foster and Mr. Moss testified that it was not unusual for supervisors to list problems beginning as much as a year prior to the Cur-

rent Entry to indicate an employee's history of performance failures.

Plaintiff's complaint about being forced to wipe down equipment during a strike likewise fails to show any indication of disparate treatment due to his race. In the late summer and early fall of 1983, defendant's craft employees went on strike. as a result, management personnel had to perform craft work in order to keep the telephone system operating. One morning during the strike, Taylor walked in to find Jerry Branson, a black managerial employee temporarily transferred to Jackson to assist with the strike and assigned to monitor critical telephone equipment, working a cross-word puzzle. Partly as a punitive measure, Taylor sent Branson and plain-

tiff to plaintiff's offices to wipe dirt off the equipment. When they returned, Taylor sent Branson and Harold Dampeer, a white first level supervisor, to wipe down the equipment in Dampeer's offices. Wiping down the equipment was an essential task routinely performed by craft people. During the strike, Taylor sent supervisory employees to accomplish this task. Under the circumstances, the court fails to see how this was discriminatory toward the plaintiff.

Plaintiff's contention that Moss would not speak with him after Taylor discharged him similarly fails to establish any disparate treatment. Moss testified that the switching office where he, Taylor and plaintiff were located, contained a great deal of very sensitive

equipment under tight security. It is defendant's policy that every time an employee is relieved of duties, even for a suspension, the employee is immediately requested to turn in his ID badge, any keys he may have, and is escorted to the door. Further interviews could be arranged through the Personnel Office.

Plaintiff also testified that he requested conversion work, apparently in the erroneous belief that this was more lucrative (McSweyn's testimony refutes this), but that conversion work was always assigned to white supervisors. It is uncontroverted, however, that plaintiff was assigned to conversions in Brandon, when Walters was his supervisor, and Flora, when Taylor was his supervisor. Both Walters and Taylor, plus

the other first level supervisors assigned to work the conversions with plaintiff - S. K. Lott in Brandon and Al McSweyn in Flora, testified that plaintiff's job performance during the conversions was unsatisfactory.

Plaintiff also complains that he was unfairly evaluated by Taylor due to the fact he utilized the wrong indices by which to measure his performance. At least part of plaintiff's complaint in this regard stems from the evaluation process itself. At the beginning of each evaluation year, Taylor meets with each of his first level supervisors so they can set goals and mutually agree on the criteria to be used for their evaluation at year end. Taylor testified that first level supervisors were not

totally free to select their evaluation criteria but they did have some input in the process. At the end of the 1982-83 evaluation year, Taylor asked his first level supervisors to turn in the criteria on which they wanted to be evaluated for the year. Taylor testified that plaintiff neglected to do this. Plaintiff testified that he did turn in the evaluation criteria and that Taylor deliberately ignored it. The court credits Taylor's version of the facts.

Plaintiff's complaint in this regard goes even further, however. Plaintiff claims he should have been evaluated on a number of indices that allegedly reflect the performance of the offices under his responsibility with more accuracy. The primary indices

plaintiff contends Taylor should have used is the NSPMP. While there is no doubt that the NSPMP is an important index reflecting the overall performance of the SP/SCC for his individual offices. A field maintenance supervisor's primary responsibility was to insure the employee's assigned to his offices performed their work as it was "loaded" and that they performed the work in an efficient manner. Other supervisors in the SP/SCC for his individual offices. A field maintenance supervisor's primary responsibility was to ensure the employee's assigned to his offices performed their work as it was "loaded" and that they performed the work in an efficient manner. Other supervisors in the SP/SCC, such as the Dispatch and

Administration Supervisor and the Cost Analysis Supervisor, were directly responsible for how the individual offices performed. The Court finds, consistent with Taylor's testimony, that the "SCC Effectiveness" index was the most accurate indicator of plaintiff's performance as a Field Maintenance Supervisor because it measured how effectively they managed the employees reporting to them.

Plaintiff also complains that he was discriminated against because he received lower evaluations than other first level supervisors whose objective indices were equal to or worse than his own. In support of his theory, plaintiff introduced the evaluation reports of Ken Carter for the years 1981-82 and 1982-83. Taylor explained that, al-

though both were first level supervisors, Carter had totally different job duties and responsibilities than did plaintiff and that the evaluation of the different jobs held by Carter and plaintiff made any comparison of their respective evaluation fruitless. Plaintiff did not place any evaluations of first level supervisors who had similar job duties to his in the record. The Court finds that plaintiff failed to carry his burden of proving disparate treatment in this regard since there is no record evidence of similarly situated first level supervisors who were evaluated differently than plaintiff. See Davin v. Delta Airlines, Inc., 678 F.2d 567, 570-71 (5th Cir. 1982) (must show dissimilar treatment for "nearly identi-

cal" offense); Houser v. Sears, Roebuck & Co., 627 F.2d 756, 759 (5th Cir. 1980) (same); Greene v. Armstrong Rubber Co., 612 F.2d 967, 968 (5th Cir.) (same), cert. denied, 449 U.S. 879 (1980).

Plaintiff also complained about the fact that Carter had eight (8) MTR errors in 1982-83 and that he only had four (4), yet a Current Entry was placed in his file mentioning, among other things, plaintiff's MTR error problem. Taylor testified at trial that MTR errors were a relatively insignificant factor in the overall scheme of things but that plaintiff had a continuing problem with one of his employees who made numerous MTR errors. Taylor testified that the remark about MTR errors in the plaintiff's February 1983 Current

Entry was a reflection of plaintiff's failure to come to grips with his subordinate's MTR problem. Furthermore, it would not have been included in a Current Entry except that Taylor was placing a history of plaintiff's performance problems in his personnel file. The Court finds there is no disparate treatment in this regard.

Plaintiff contends that the situation in the instant case is identical to the facts in Barnes v. Yellow Freight Systems, Inc., 778 F.2d 1096 (5th Cir. 1985), where, as here, the court found as a fact that the plaintiff was not qualified to perform the job from which he was removed. According to the Yellow Freight rationale, a plaintiff can prevail on his discrimination claim even

where the court finds he was unqualified for the position from which he was removed if he could prove that a similarly situated white employee was treated more favorably than him.

Plaintiff contends that Ken Carter and H. D. Frazier were not disciplined for performance and disciplinary problems similar to those for which plaintiff was disciplined. The Court finds there is no credible evidence to establish that either Carter or Frazier actually committed the offenses alleged by plaintiff or that they were so similar to plaintiff's as to warrant similar treatment. See Davin v. Delta Airlines, Inc., supra.

Furthermore, there is no record evidence whatsoever showing more favor-

able treatment of other similarly situated employees. Indeed, the record evidence indicates that the contrary is the case. According to the record evidence, the only other employee receiving S-90 annual evaluation rating was D. A. Walters, a white second level supervisor. The record further establishes that Walters was removed from his position and demoted to a non-supervisory position after receiving only one S-90 rating. Plaintiff, on the other hand, received three (3) S-90 ratings and an unsatisfactory (80) rating prior to being offered a demotion. Additionally, the evidence shows that Don Frazier, a white first level supervisor, had a Current Entry placed in his file in 1983, regarding his less than satisfactory

performance. Frazier was placed on sixty (60) days probation at that time. Plaintiff received exactly the same treatment in his Current Entry form. Taylor's undisputed testimony, however, established that Frazier's performance improved following the placement of the Current Entry in his file, whereas plaintiff's performance did not. The court finds that plaintiff was accorded similar, if not better, treatment regarding his performance problems than defendant's white SP/SCC supervisors.

Plaintiff also claims that certain of defendant's actions immediately preceding and following his removal as a first level supervisor indicate a discriminatory motive on its part. Plaintiff contends that Taylor actively

pursued, and ultimately succeeded, in attaining the transfer of Alvester Williams, a black first level supervisor, into the Jackson SP/SCC prior to removing plaintiff. Plaintiff's theory is that, due to defendant's affirmative action obligations, Taylor could not afford to remove plaintiff without first acquiring another black first level supervisor. Defendant's affirmative action compliance officer, Lindsay Carter, testified that the company's affirmative action obligations were not categorized in terms of one particular department within the company, but rather by position within a category of departments. In other words, the relevant inquiry was not how many black first level supervisors worked in the SP/SCC but rather how

many black first level supervisors worked in the entire network segment, which includes the Distribution Department and the Planning and Engineering Department as well as Switched Services.

Mr. Carter also testified that, although it was often difficult to find adequate numbers of qualified blacks for technical positions, that blacks were currently being utilized in the entire network segment in accordance with the goals set forth in defendant's affirmative action plan. Furthermore, Moss testified that, although black supervisors were a "prized commodity", the fact that Taylor did not supervise a black first level supervisor would not have negative impact on his performance evaluation. Moss testified that the Equal

Employment Efforts portion of a supervisor's annual evaluation had nothing to do with the number of minorities working under the manager's supervision but rather how well he worked with the minorities under his supervision. In sum, the court finds that plaintiff's contention in this regard is without merit.

It is also apparent from the record that plaintiff was ultimately replaced by Alvester Williams. Moreover, Mr. Williams has received extremely positive evaluations from Taylor, the same person plaintiff contends discriminated against him. The court has to ask itself why Mr. Taylor would intentionally discharge plaintiff because of his black race only to replace him with another black employee who is, by all accounts, perform-

ing very well. After all, plaintiff's contention is that Taylor needed to have a black first level supervisor for affirmative action purposes. Plaintiff's theory in this regard cuts against his primary theory that Taylor discriminated against him because of his black race.

Plaintiff also points to the fact that, following his removal, Taylor assigned two (2) female frame attendant supervisors, who lacked technical training to supervise switching control technicians and perform plaintiff's job duties. Taylor testified that in accordance with the company's AAP/EEO policy he gave the frame attendant supervisors the opportunity to see if they could handle a field maintenance supervisor's job. After a short period of time,

Taylor determined they were not capable of performing the tasks due to lack of technical knowledge, and ultimately placed Alvester Williams in plaintiff's old position. The court finds these actions were not discriminatory.

Plaintiff's final argument with regard to pretext is that it was defendant's policy and practice to discriminate against blacks. In 1973, defendant was placed under a federal court consent decree that mandated affirmative action on its part to hire and promote minorities. The consent decree obligations ended in 1979. Defendant then voluntarily adopted affirmative action goals and time tables until it entered into a national affirmative action plan with the Office of Federal Contract Compliance

Programs in 1982. The equal employment efforts by supervisory employees are a part of every management employee's annual evaluation.

At trial plaintiff called a number of defendant's black employees who testified they "felt" they were being discriminated against in their employment. Alvester Williams, for instance, testified he thought he should have been promoted and that the fact he had not been promoted was due, in his opinion, to discrimination. However, the undisputed evidence established that Williams was rated "promotable" by Taylor and Moss but there had been no openings in Moss' organization in several years. In fact, Moss testified that, due to technological changes, his organization was

shrinking and that the opportunities to advance within Switched Services was small. Both Williams and Moss testified that Moss told Williams to explore opportunities outside Moss' group.

Herman Cline, a black switching equipment technician, also testified that, in his opinion, he had been discriminated against because he had not been promoted into a management position. However, there is nothing in the record to indicate that Mr. Cline was qualified for promotion or that similarly situated whites were given opportunities he was denied.

Plaintiff also dwelled upon the relatively small number of blacks in management level positions in "Switched Services". The court, however, credits

Lindsay Carter's testimony about the scarcity of qualified blacks for technical positions. The court also takes note of defendant's efforts to recruit technically qualified black employees. Mr. Carter testified that defendant participated in community action programs that have the effect of encouraging young black people to seek careers in technical fields. In sum, the court finds that defendant's actions in removing and offering plaintiff a demotion were based upon legitimate concerns about plaintiff's history of poor performance and that plaintiff was treated the same, if not better, than similarly situated white employees in affecting that decision.

With regard to plaintiff's retaliation-

tion claim, plaintiff has failed to establish through any credible evidence that he was dismissed in retaliation for filing two EEOC charges against defendant. Plaintiff's first charge was filed in 1973 and he received a right-to-sue letter in 1976. Taylor testified that he was unaware of plaintiff's first EEOC charge until after the instant action began. Plaintiff's second EEOC charge, filed in 1980, concerned alleged pay discrimination. The events that led to that EEOC charge all took place before Taylor's evaluations had any impact on plaintiff's wage rate. Taylor did not evaluate plaintiff until January 30, 1981. Additionally, the EEOC issued plaintiff a right-to-sue letter on March 12, 1981, finding no reasonable cause to

believe plaintiff's allegations were true. Plaintiff took no further action on that charge. Plaintiff simply failed to produce any evidence showing a nexus between his EEOC charges and his removal. See McMillian v. Rust College, Inc., 710 F.2d 1112 (5th Cir. 1983). The court finds plaintiff's retaliation claims are without merit.

With respect to plaintiff's transfer claims, plaintiff likewise failed to carry his burden of proof. Plaintiff put on no proof establishing any openings the company had for which he was qualified. Furthermore, Taylor testified that he attempted to transfer plaintiff but that his efforts were unsuccessful. Plaintiff was temporarily loaned to another supervisor with the

possibility that he might be transferred there permanently if his work proved satisfactory. Plaintiff's work, however, proved to be less than satisfactory and he was returned to Taylor's department. Plaintiff also contends that two white first level supervisors, Mickey Gaddis and W. F. Bell, were transferred from Switched Services during the same time period during which he sought a transfer. The record shows, however, that both Gaddis and Bell had a much better history of performance than plaintiff. The record shows, however, that both Gaddis and Bell had a much better history of performance than plaintiff. The Court finds that due to plaintiff's performance at the lowest managerial level, the only other posi-

tion for which he was qualified was a craft or non-managerial position. Defendant offered plaintiff such a transfer opportunity but he refused. The court finds plaintiff was not discriminatorily denied a transfer.

During the trial, plaintiff raised for the first time a claim that he was discriminated against in terms of pay. Plaintiff's pay claim is brought pursuant to Section 1981 (42 U.S.C. § 1981) only, due to the fact it was not part of his most recent EEOC charge. As a result, plaintiff was barred from litigating any pay discrimination claims arising prior to November 18, 1982, which is one year prior to the filing of his complaint. See White v. United Parcel Service, Inc., 692 F.2d 1 (5th Cir.

1982).

Assuming without deciding that plaintiff can maintain an equal pay claim under Section 1981 and that the requirements for an equal pay claim under Section 1981 are the same as those under Title VII, plaintiff has failed to establish any disparity in his pay as compared to similarly situated white employees that can be attributed to his race. In order to establish an equal pay claim, plaintiff must prove that he was paid less than a non-minority for work requiring substantially the same responsibility. See Plemmer v. Parsons - Gilbane, 713 F.2d 1127 (5th Cir. 1983). Once a plaintiff meets this threshold burden, the same burden and allocation of proof applies to an equal

pay claim as if it were any other Title VII case. Plemmer, supra.

The record evidence shows that, as of October 1981, plaintiff was earning slightly less than all but one other white first level SP/SCC supervisor. The evidence also shows, however, that plaintiff had a performance rating of G-93, which was lower than any of the first level supervisors. The record also shows that plaintiff was rated S-90 in the three (3) years prior to 1981, which was lower than any other first level supervisor. Even with his prior low ratings, however, plaintiff was earning \$900.00 more than Ken Carter, although Carter received a G-96 on each of his annual evaluations. Plaintiff made \$1,000.00 less than Don Frazier and

William Bell, who were both consistently rated G-96 and who had as much seniority as plaintiff. Hal Dampeer and Al McSweyn respectively made \$2,400.00 and \$2,200.00 more than plaintiff. Dampeer had been a first level supervisor since 1974, while McSweyn had been a first level supervisor since 1977. Both men were rated G-100 on their 1981-82 evaluation and had been rated highly on all previous evaluations.

The court finds that defendant's salary administration system and plaintiff's annual evaluation scores account for the differences between plaintiff's salary and the other first level supervisors in the SP/SCC. Accordingly, the court finds that plaintiff's equal pay claims are without merit.

The Court directs defendant's counsel to submit a Judgment in accordance with this Memorandum Opinion and the Local Rules dismissing each of plaintiff's claims at plaintiff's cost.

ORDERED this the 23rd day of January, 1987.

UNITED STATE MAGISTRATE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 87-4337

CLEMMIE SANDERS
Plaintiff-Appellant
versus
SOUTH CENTRAL BELL TELEPHONE COMPANY
Defendant-Appellee

Appeal from the United States District
Court
for the Southern District of Mississippi
(CA-J83-0829(B))

(October 18, 1989)

Before REAVELY, KING and JOHNSON Circuit
Judges.

JOHNSON, Circuit Judge:

Plaintiff Clemmie Sanders appeals
from the district court's dismissal of
Sanders' civil rights action against his

former employer. For the reasons cited herein, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff-appellant, Clemmie Sanders (hereafter Sanders), a black male, contending that he was not promoted, not transferred and ultimately discharged because of his race, filed this civil rights action against his employer, the South Central Bell Telephone Company (hereafter telephone company). Sanders complained that the telephone company's conduct was racially motivated and was in retaliation for previous charges of discrimination that Sanders had lodged with the Equal Employment Opportunity Commission (hereafter EEOC). Sanders later amended his original complaint to include an equal pay claim.

Sanders was hired by the telephone company as a frameman on August 24, 1970 and was promoted to switchman on December 1, 1974 having completed the necessary training in less time than was considered normally necessary. Later, the telephone company, after determining that Sanders was not qualified to assume a supervisory position, sent Sanders to a local college to prepare him for promotion.¹ Thereafter, Sanders was promoted to a first level supervisor's position on August 1, 1977. Sanders remained in various supervisory positions until leaving the telephone compa-

¹The telephone company's equal employment opportunity policy provided that minority employees not otherwise qualified for promotion to a managerial capacity would be sent to local educational facilities in order to prepare them for promotion.

ny in 1983.

During the period of time relevant to this case, Sanders filed three charges of discrimination with the EEOC. Sanders' first such charge, filed in 1973, alleged that the telephone company had not promoted Sanders in 1971 because he was black. Responding to Sanders' allegations, the EEOC issued a determination that there was cause to believe Sanders' allegation was true.²

²The EEOC made the following findings: As of June 30, 1972 Respondent employed almost 7,000 persons in Mississippi of whom approximately 7.8 percent were Black. In the category to which Charging Party was seeking promotion, Respondent employed over 1,850 persons in Mississippi, of whom 4.8 percent were Black. The 1970 Census figures show the population of Mississippi to be 30 percent Black.

During 1972 a total of 29 persons were promoted to Switchman in Mississippi.

This claim was mooted, however, when Sanders was promoted the next year. Several years later in 1980, Sanders filed a second discrimination charge with the EEOC alleging that as a first level supervisor, he was receiving less pay than similarly situated white supervisors. On March 12, 1981, the EEOC found no reasonable cause to believe Sanders' allegations were true. Sanders' final EEOC complaints, filed on December 6, 1983, alleged that he was

Of these none were Black. At the end of that year, of 290 persons with the Switchman title in Mississippi, only 2 (0.7 percent) were Black, and in Jackson only (1.4 percent) of 73 was Black

Based on the foregoing factors in this promotion and the pattern of promotion during 1972, there is reasonable cause to believe that race was a factor in at least this denial of promotion for Charging Party.

discharged by the telephone company because he was black. Responding to this claim, the EEOC, on February 3, 1984, issued Sanders a right to sue letter without making any findings as to the validity of the allegations.

When Sanders was promoted to first level supervisor on August 1, 1977, his new supervisor was W. P. Cessna. Sanders, however, was never evaluated by Cessna because Cessna was replaced by D. A. Walters a few months later. In turn Walters was replaced by S. R. Taylor in 1980. During the time Sanders was supervised by Cessna, Walters and Taylor, the telephone company's policy was to conduct annual formal performance evaluations on first level supervisors such as Sanders. As the district court aptly

noted, these standardized performance evaluations and the telephone company's system of salary administration were, to say the least, complex. Moreover, the telephone company's employee performance evaluation policies were subject to frequent revisions by its head office in Birmingham, Alabama.

At the time Sanders first became a supervisor in 1977, the telephone company utilized a performance evaluation system which incorporated four overall ratings: "U" or unsatisfactory, "S" or satisfactory, "G" or good, and "O" or outstanding. Within each alphabetical rating was a set range of possible numerical values that purportedly "fine-tuned" the evaluation. Thus, an employee could be rated from U-71 to

U-80, S-81 to S-90, G-91 to G-100, or O-100 to O-110. In what was ostensibly an attempt to simplify the system, the telephone company eventually limited the number of possibly numerical values in each category to three: U-73, U-76, U-80; S-83, S-86, S-90; G-93, G-096, G-100; and O-103, O-106, O-110. In 1981, however, the telephone company went to a completely numerical system, jettisoning the alphabetical prefixes altogether.

The telephone company's system of salary administration was tied to its evaluation system. When an employee was promoted from labor to management, that employee customarily was assigned a G-96 rating. The new supervisor would typically retain that G-96 rating until such

time as his performance dictated otherwise. Additionally, a new supervisor would be paid an initial wage that was customarily some seven to ten percent above his or her old non-management wage rate. If the new wage calculated on that basis did not result in a wage commensurate with the minimum entrance wage rate for first level supervisors, the new supervisor would receive an additional increase in an amount necessary to achieve parity with the wages that were paid other first level supervisors.

Each telephone company management position is assigned a salary range. The actual salary that a supervisor makes is tied directly to his or her annual evaluation rating. In theory, if a supervisor receives a rating of G-96

(or 96 under the later system), his or her salary should be approximately 96% of the top level figure for that position's particular salary range. The system, however, is not that simple. Seniority is also a factor. The telephone company generally considers that it takes approximately six years for a new supervisor to reach an optimal level of performance in a given position. Thus, a supervisor with one year's experience who is rated G-96 does not receive the same salary as a similarly rated supervisor with six year's experience. In sum, the telephone company's salary administration system, at least for supervisors, is governed by four major factors: the supervisor's initial wage range, the salary range for a par-

ticular management position, the supervisor's seniority and the supervisor's annual performance evaluation rating.

In 1977, when Sanders was promoted to a first level supervisor, he was given a rating of G-93. In 1978, however, Sanders' rating slipped to S-90³ where it remained until 1981 when Sanders again received a rating of 93. In 1982, however, Sanders' rating plummeted to 80. At trial, the undisputed evidence established that Taylor, Sanders' supervisor, never gave any first level supervisor other than Sanders a rating less than G-96. Taylor, and his supervisor, Hal Moss, both testified that they ex-

³ Sanders contends that Walters had actually assigned a rating of G-93 but was forced to reduce the rating to S-90 by Hal Moss, Walters' supervisor.

pected first level supervisors under their supervision to perform at least in the "G", or 93 and above, range on their evaluations. The Evidence at trial also showed that a white second level supervisor was demoted to a non-supervisory position after receiving a single S-90 rating from Moss in 1980.

During the time period relevant to this case, Sanders was employed as a first level supervisor in the Jackson and Meridian District Stored Program Switching Control Center ("SP/SCC").⁴ While, Cessna and Walters were supervising Sanders, Sanders was in charge of

⁴A Stored Program Switching Control Center is a highly sophisticated, computerized switching center that is admittedly one of the most technical and complicated operations of the telephone company.

supervising Dispatch Administration and Trunk Maintenance. When Taylor became Sanders' supervisor, Sanders was supervising Trunk Maintenance. It was during that time, that Taylor, according to his testimony at trial, first began experiencing problems with Sanders' performance.

Although first level supervisors worked from 8:00 a.m. to 5:00 p.m., Taylor decided in October of 1980 that supervisors were needed to supervise employees who worked irregular hours. Accordingly, Taylor assigned Don Frazier, a white male, and Sanders to work the 4:00 p.m. to midnight and midnight to 8:00 a.m. shifts respectively. At trial, Taylor testified that he chose Frazier and Sanders to work the night

shifts because they needed experience "working trouble in the field." Further, Taylor testified that Sanders was assigned to that particular shift because there were fewer employees to supervise and Sanders would have a better opportunity to gain experience in the technical aspects of his job. Sanders, on the other hand, contended that Taylor's explanation at the time -- that the assignments were being made on the basis of seniority -- was untenable since Sanders had greater seniority than his predecessor. Additionally, during this time period, Sanders sought reassignment unsuccessfully after reportedly receiving threatening notes with racial overtones.

In late 1980 or early 1981, Sand-

ers, was temporarily assigned to the telephone company's Network Service Center. This was a purported attempt by Taylor and Moss to place Sanders in a new environment without subordinates so that Sanders' performance could improve. Theoretically, if Sanders had demonstrated improvement in the temporary assignment, he would have been assigned permanently to the Network Service Center.⁵ Sanders' first evaluation by his Network Service Center supervisor in June, 1981, however, reported that Sanders had "little knowledge of the various switching systems ... toll carrier systems, or operation of the network." Soon thereafter, Sanders' Network Serv-

⁵ Sanders, unsatisfied with the temporary assignment, unsuccessfully petitioned to be transferred several times.

ice Center supervisor requested that Sanders be returned to his old assignment until a more suitable replacement could be found. Accordingly, Sanders was returned to Taylor's supervision in September of 1981.

In another purported effort to enhance Sanders' understanding of telephone company switching technology, Taylor assigned Sanders to a Field Maintenance Supervisor's position -- a position which allegedly allowed Sanders more time to learn about the network by giving him fewer supervisory responsibilities. In this position, Sanders again began experiencing problems. As a result of alleged deficiencies in his performance, Sanders was relieved by Taylor of some, but not all, of the su-

pervisory duties associated with the new position.

Throughout the first half of 1982, Sanders was closely supervised by Taylor. In June 1982, Sanders showed improvement and was rated 93 on his evaluation. Thereafter, however, Taylor reportedly relaxed his level of supervision, and Sanders' performance allegedly deteriorated. On February 1, 1983, Sanders was placed on probation and Taylor informed him that if his performance did not improve within sixty days, disciplinary action would be forthcoming. Ultimately on April 22, 1983, Taylor told Sanders that he was not performing satisfactorily. Taylor reportedly offered to help Sanders look for work elsewhere.

On April 27, 1983, Sanders completed a "Record of Quality Inspections" with one of his employees, John Woodall, a switching control technician. In this report, Sanders noted that a new Flora to Greenwood Trunk tested "OK."⁶ In reviewing Sanders' report, Taylor learned that the new Flora to Greenwood trunk could not have tested "OK" since the necessary wiring had not yet been completed and the trunk was not operational. Taylor confronted Sanders with this circumstance and accused Sanders of falsifying the report. Then, and later at trial, Sanders denied that allegation. At the time of his meeting with Taylor, Sanders contended that his re-

⁶ Trunks are devices that are used to interconnect calls between central offices.

port actually meant that Sanders had observed Woodall employing the proper trunk testing procedures. Later during his deposition, Sanders testified that Woodall had tested the trunks from Flora to Capital-Pearl. At trial, after listening to Woodall's testimony, Sanders, however, testified that the trunks had really been tested from Flora to Meadowbrook.⁷

Following the above described incident, Taylor, Moss and Charles

⁷At trial, the issue of whether the trunks could be tested at all was a matter of dispute. The magistrate, after hearing all of the evidence, concluded that the trunks were simply not operational at the time Woodall attempted to test them. In that regard, the magistrate concluded that Sanders did not falsify the records, but rather made a mistake of major proportions in issuing the report as a result of inefficiency and lack of attention on the job.

Foster, Operating Manager for South Central Bell,⁸ met to discuss Sanders' future with the telephone company. As a result of the meeting, Taylor, Moss and Foster decided to demote Sanders. They elected, however, to wait until Sanders' next evaluation to inform him of his decision. Immediately after the meeting, Sanders was immediately relieved of his supervisory duties over switching equipment technicians and was assigned the duties of the Building Manager. It was later on September 26, 1983, during a review of his performance evaluation, that Sanders was eventually

⁸ Foster testified at trial that it was his duty to review personnel decisions regarding minority employees in order to ensure that the decision being made was one based on the merits and not the result of discriminatory animus.

advised that he could either accept demotion or be terminated. The next day, Sanders chose the latter option.⁹

In early 1983, Sanders filed suit against the telephone company pursuant to 42 U.S.C. 2000 et seq., and 42 U.S.C. §1981 alleging retaliatory discharge and racially discriminatory employment practices. Sanders later amended his complaint to include an equal pay claim. The district court entered an Order of Reference, and after a full proof bench

⁹The evaluation was not made known to Sanders until after the telephone company's craft employees had concluded a strike which began in August, 1983, and ended in September, 1983. Sanders contends that the delay was deliberate so that the telephone company could continue to receive the benefits of Sanders' technical expertise during the strike. The magistrate acknowledged that while the delay benefited the telephone company, it was not the result of any discriminatory motive.

trial, the magistrate concluded that Sanders' claims were without merit. Final judgment was entered dismissing Sanders' claims with prejudice. After post-trial motion were overruled, Sanders filed timely notice of appeal. Thereafter, the appeal was dismissed for failure to timely file briefs. On March 23, 1989, however, this court, concluding that Sanders should not be penalized for the dereliction of his attorney, ordered the appeal be reinstated. Sanders has proceeded with substituted counsel.

II. DISCUSSION

The United States Supreme court, in McDonnell Douglas Corp. v. Green, 411 U.S. 792 articulated a three tiered approach to Title VII claims. First, the

plaintiff is obligated to present a prima facie case of discrimination which thus creates the presumption of Title VII violation. Second, the defendant may rebut the presumption by showing a lack of discriminatory motive. Third, the plaintiff is free to attack the rebuttal as being pretextual in nature. Id. at 804. Thus, the plaintiff essentially retains the burden of persuasion throughout the trial. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). Further, in a full proof bench trial, "the factual inquiry proceeds to a new level of specificity," United State Postal Service Board of Governors v. Aikens, 460 U.S. 711 and the ultimate issue is whether or not there was intentional

discrimination under Title VII. Williams v. Southwestern Bell Telephone Co., 718 F.2d 715, 717 (5th Cir. 1983). The plaintiff's burden of persuasion on that issue may be met "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that employer's proffered explanation is unworthy of credence." Id. at 717 (quoting Burdine, 450 U.S. at 256).

This Court, in reviewing the findings of fact which emerge as result of a bench trial such as was held in the instant case, is bound by a clearly erroneous standard of review. The district court's findings will not be disturbed by this court unless they are clearly erroneous. Fed. R. Civ. P.

52(a). Such findings of fact are clearly erroneous when, although there is supporting evidence, the reviewing court is "left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Company, 333 U.S. 364, 395 (1948). We review the district court's findings in this case accordingly.

At trial, Sanders argued that the telephone company's sole motive in failing to pay him what a similarly situated white employee would earn, and discharging him were all the result of racial discrimination. The telephone company countered that its actions were taken as the result of Sanders' inability to adequately perform the requisite supervisory duties. Sanders, however, asserted

that the telephone company's explanation in that regard was merely pretextual. The district court, after hearing all of the evidence, disagreed with Sanders and therefore found in favor of the telephone company on all of Sanders' claims.

Sanders urges on appeal that the district court's findings that the telephone company's actions were not racially motivated is clearly erroneous. Specifically, Sanders contends that the district court erred by finding that Sanders was unable to satisfactorily perform his job duties as a first level supervisor. In that regard, the district court observed that Sanders was an "intelligent and capable employee" who "as nevertheless "promoted beyond his abilities" and was therefore unable to

"master the complex technological changes constantly occurring in the SP/SCC." In support of that conclusion, the magistrate noted that the critical SP/SCC is at the very heart of the telephone company's operational core and that all SP/SCC management employees are "under the gun."

Every supervisor under whom Sanders worked while he was a managerial employee testified at trial. With the exception of Cessna, all of Sanders' supervisors testified that Sanders' job performance was less than satisfactory. They further testified that Sanders was unable to adequately supervise his subordinates and lacked the knowledge necessary to supervise the operation of the complicated switching networks. Cessna,

although unable to draw any conclusions regarding Sanders' job performance due to their short time together, testified that Sanders was a "slow learner." One of Sanders' subordinates testified that Sanders was a poor supervisor who could not adequately communicate with or discipline his employees. After hearing from all of the above individuals, the district court concluded that their testimony reflected sincerely held beliefs and was not racially motivated.

On appeal, Sanders' nevertheless continues to argue that the reasons given by the telephone company for his discharge were pretextual. The Seventh Circuit, in Mister v. Illinois Central Gulf R. Co., 832 F.2d 1427, 1435 (7th Cir. 1987), articulated a practical def-

initiation of a pretext in the context of Title VII claims. A pretext, according to the Seventh Circuit is a

statement that does not describe the actual reasons for the decision. The employer need not have 'good' reasons, and a mistaken business decision is not on that account a 'pretext.' But an explanation that does not convey the motivation for the decision is a pretext, and if the hypothesis of racial motive best explains the actions, then also a 'pretext for discrimination.'

(citations omitted). See also Pollard v. Rea Magnet Wire Co., 824 F.2d 557 (7th Cir. 1987). Sanders contends that, in light of the above standard, there are a number of inferences to be drawn from the record that support his claims that the reasons given for his discharge are pretextual in nature.

Sanders' contention notwithstanding, this Court is constrained not to

retry the issues. We are guided by the principle that reviewing courts are not free to set aside a finding of fact "as clearly erroneous merely because another court may give the evidence a different construction or resolve the ambiguities differently." Dickens v. United States, 545 F.2d 886, 89- (5th Cir. 1977) Nor are we free to reverse the findings of the district court solely because the evidence would support a conclusion either way. Id. Thus, whatever our conclusions might be, whether in consonance or at odds with the findings of the district court, we simply are unable to substitute our own findings unless we are left with the "definite and firm conviction that a mistake has been committed." United State v. United States

Gypsum Company, 333 U.S. 364, 395 (1948). On the facts of this case, we are not left with such a conviction and accordingly, we are constrained not to disturb the findings of the district court.¹⁰

¹⁰Because we have so concluded, we do not reach the issue of whether Sanders' equal pay claim under 42 U.S.C. §1981 has vitality in light of Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1981).

III. CONCLUSION

Concluding that the district court's finding that the telephone company's actions concerning Sanders were the result of Sanders' incompetence rather than racial discrimination is not clearly erroneous, we affirm the judgment of the district court dismissing Sanders' claims with prejudice.

AFFIRMED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 87-4337

CLEMMIE SANDERS
Plaintiff-Appellant
versus
SOUTH CENTRAL BELL TELEPHONE COMPANY
Defendant-Appellee

Appeal from the United States District
Court for the Southern
District of Mississippi
(CA-J83-0829(B))

ON PETITION FOR REHEARING

(November 17, 1989)

Before REAVELY, KING and JOHNSON Circuit
Judges.

PER CURIAM:

IT IS ORDERED that the petition for
rehearing filed in the above entitled
and numbered cause be and the same is

hereby denied.

ENTERED FOR THE COURT:

signed Sam Johnson
United States Circuit Judge